BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

COREY A. TRESNER	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,054,390
HARLOW AEROSTRUCTURES LLC	)	
Respondent	)	
AND	)	
	)	
ACCIDENT FUND NATIONAL INSURANCE	)	
Insurance Carrier	)	

ORDER

Respondent appeals the June 21, 2011, preliminary hearing Order of Administrative Law Judge Nelsonna Potts Barnes (ALJ). The ALJ entered this Order following a remand from the Board. Claimant was awarded medical treatment with Dasa V. Gangadhar, M.D., as the authorized treating physician; respondent was ordered to pay all medical expenses related to the treatment of claimant's left eye; claimant was awarded temporary total disability compensation (TTD) beginning December 17, 2010, and continuing until January 4, 2011; and claimant was found to be entitled to additional TTD if taken off work by the authorized treating physician.

Claimant appeared by his attorney, John L. Carmichael of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Matthew J. Schaefer of Wichita, Kansas.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the Discovery Deposition of Corey Andrew Tresner taken March 15, 2011; the transcript of Preliminary Hearing held March 31, 2011, with exhibits; and the documents filed of record in this matter.

ISSUES

1. Did claimant suffer personal injury by accident which arose out of and in the course of his employment with respondent? Respondent argues that since the accident occurred while claimant was on his lunch break and away from respondent's

premises, it is a non-compensable incident. Claimant argues that his job duties with respondent expose him to small metal slivers and it was one of those slivers which got into his left eye and damaged his cornea. Therefore, the injury was due to a hazzard of the job with respondent. Claimant contends that the fact the incident occurred off the premises and during his lunch break is not the determinative factor.

2. Did the ALJ exceed her jurisdiction in awarding TTD from December 17, 2010, through January 4, 2011, a period of 17 days, in violation of K.S.A. 510c(b)(1)?

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be reversed.

Claimant became employed by respondent on August 26, 2009, as a machinist. His duties included placing a raw product on a computer-controlled CNC lathe. Claimant would then program the computer to direct the machine on what specific product was to be cut from the raw material. While the machine was doing the cutting, claimant would be separated from the process so as to not be exposed to the metal slivers and shavings created during the process. However, when the part was made, the part would exit the cutting area and claimant would then use an air hose to blow the metal slivers off the created part. This cleaning process would cause metal slivers to get on claimant's hands and clothing. Claimant would blow the slivers off his clothing and would wash his hands. But, not all the metal slivers would be removed. Claimant testified that some of the slivers are so small that he does not even notice them on his hands until they start to fester.

On December 17, 2010, the date of accident, claimant was working the 3:15 p.m. to 11:45 p.m. shift. At about 8:00 p.m., claimant left to go to his 30-minute lunch break. He went to his car and drove off respondent's property, heading to a Quick Trip. As claimant was driving on a street in Wichita, Kansas, his left eye started itching. Claimant rubbed his eye with his hand, and the eye instantly started burning and his vision was blurry and his eye was watering. Claimant suddenly noted that he was unable to see out of the eye. Claimant contacted David Hunter, respondent's production manager, and explained the situation. Claimant also testified that he contacted James Reno, his supervisor. Claimant was instructed to go immediately to the emergency room. Claimant testified that he had a beanie in his hand when he rubbed his eye. But, he does not remember if he used the beanie or just his hand to rub his eye. He described the beanie as a skull cap that he wore as it was winter time. He did not wear the beanie at work as it was too warm in respondent's building. He would keep the beanie in the pocket of his coat which he hung on his toolbox.

Claimant then proceeded to Via Christi St. Joseph's Hospital where it was determined that claimant had lacerated his cornea. Claimant was then air flighted to the University of Kansas Medical Center, in Kansas City, where he underwent surgery in

the Department of Ophthalmology, under the care of corneal surgeon John Sutphin, M.D., to repair the cornea. Claimant also underwent a cataract surgery on December 31, 2010. This was the result of the earlier surgery to repair the laceration. Clamant was later transferred to corneal specialist Dasa V. Gangadhar, M.D., in Wichita, Kansas. This was because claimant was having difficulty returning to KU for treatment. A CAT scan of the eye failed to identify any foreign object in claimant's eye. A medical report of December 22, 2010, from the Ophthalmology Department states "metal-ruptured cornea".[1] Claimant acknowledged that no medical personnel ever identified a metal shaving in his eye. Claimant testified that he told the personnel at KU of the metal slivers. No additional explanation is contained in this record, apart from claimant's testimony. Claimant acknowledged that he advised the doctors of the possibility of the metal slivers from his job. Claimant testified that it was common to get those slivers in his fingers where they would cause a blister. The pieces were described as being very sharp and very small. On the date of the accident, claimant was wearing jeans and a t-shirt. His coat and beanie were hanging away from the machine.

At the time of the preliminary hearing, claimant remained under the doctor's care. He had a return appointment on April 18, 2011, for the removal of sutures from his eye.[2] His future care might involve a corneal transplant, as the laceration was in the center of his eye. Claimant continues to experience light sensitivity and associated headaches. Claimant's sight remains somewhat blurred but is improving. Claimant was returned to work for respondent, effective January 4, 2011. During his time off work, claimant was paid short-term disability.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[3]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[4]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an

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[1] P.H. Trans., Resp. Ex. 2.

[2] Discovery Depo. of Claimant at 23.

[3] K.S.A. 2010 Supp. 44-501 and K.S.A. 2010 Supp. 44-508(g).

[4] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

> employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[5]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[6]

This record contains no medical opinion regarding what may have caused claimant's corneal tear. The CAT scan done at KU failed to identify any foreign object in claimant's eye. While speculation is possible in this case, it is only speculation. It is the claimant's burden of proving, by a preponderance of the evidence, that his or her position is more probably true than not true. A medical opinion addressing what would be required to cause this type of injury would have helped. Whether it would take a sharp object such as a metal sliver or whether such an injury could result simply from a finger nail is not known. Here, claimant has failed to satisfy his burden of proving that he suffered a personal injury from a metal sliver from work. Without an answer to that question in claimant's favor, the remaining questions regarding the "going and coming" rule, the "premises" exception and hazzards of claimant's job need not be discussed.

This Board Member finds that claimant has failed to satisfy his burden of proving that he suffered personal injury by accident which arose out of and in the course of his employment with respondent. The Order of the ALJ is reversed.

This finding renders moot the issue dealing with the award of TTD.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[7] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

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[5] K.S.A. 2010 Supp. 44-501(a).

[6] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[7] K.S.A. 44-534a.

CONCLUSIONS

Claimant has failed to prove by a preponderance of the credible evidence that he suffered personal injury which arose out of and in the course of his employment with respondent. The Order of the ALJ granting preliminary benefits is reversed.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Nelsonna Potts Barnes dated June 21, 2011, should be, and is hereby, reversed.

IT IS SO ORDERED.

Dated this ____ day of August, 2011.

HONORABLE GARY M. KORTE

c: John L. Carmichael, Attorney for Claimant
Matthew J. Schaefer, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge